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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HARVEY M. SILETS
7 South Dearborn Street
Chicago, Illinois 60603
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 12, ILL. LA review 5-6581

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on October 4, 1966, ordering that a writ of mandamus issue against petitioner directing him to vacate his order upon the re-

spondent to answer question 25 in defendant's motion for bill of particulars in the case entitled *United States of America* v. *Simmie S. Horwitz,* No. 65 CR 464; pending before petitioner in the United States District Court for the Northern District of Illinois, Eastern Division.

CITATION TO OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit was entered on October 4, 1966 and has not been reported. The opinion of Petitioner has not been reported.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on October 4, 1966, and a timely petition for rehearing *en banc* was denied on December 5, 1966. The jurisdiction of this Court is involved under 28 U.S.C., 1254(1); 62 Stat. 928.

QUESTIONS PRESENTED

1. Does a Court of Appeals have jurisdiction to issue a writ of mandamus to prohibit a District Court from directing the Government to furnish a request for a bill of particulars where there is no statutory authority for an appeal by the Government from such order, and where the District Court has lawfully exercised its prescribed jurisdiction?

2. Can a Court of Appeals substitute its discretion for that of a District Court by the issuance of a writ of mandamus preventing the District Court from requiring the Government to furnish a bill of particulars which may disclose, in part, the names of some prospective witnesses?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Because of the number and length of the constitutional provisions and statutes involved, they are set forth as Appendix G, page App. 11-14, *infra.*

STATEMENT OF THE CASE.

Petitioner is a Judge of the United States District Court for the Northern District of Illinois. Pending before him are two indictments brought by the United States against one Simmie S. Horwitz for making and subscribing false corporate income tax returns in violation of Section 7206(1), Internal Revenue Code, 1954 (26 U.S.C. 7206 (1)). After entering a plea of not guilty, the defendant filed several motions with petitioner, including a motion for bill of particulars. This petition is directed against the writ of mandamus issued by the Court of Appeals for the Seventh Circuit directing petitioner to vacate his order granting request 25 of the requested particulars.

Request 25 and request 24 (A. 13)[1] upon which it is predicated reads as follows:

Request 24 is as follows:

> "24. Does the Government rely upon any oral statements of the defendant to support the charge in the several counts of the indictments?"

[1] Since the matter arose in the Court of Appeals on the Government's Petition for Writ of Mandamus, all record references are to appendices filed by the parties in that court. "A" refers to Government's Appendix; "S.A." refers to Petitioner's Supplemental Appendix.

Request 25 is as follows:

"25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

(a) the name and address of the person to whom the statement was made;

(b) the date on which the statement was made;

(c) the place where it was made;

(d) the substance of the statement;

(e) whether the person to whom the statement was made was a Government agent at the time of the statement;

(f) the names and addresses of any other person present at the time the statement was made; and

(g) whether a written memorandum or verbatim transcript of the oral statement was made, and if so, whether the Government has possession of the memorandum or transcript."

Following petitioner's grant of this request (A. 3, S.A. 1-2), the Government filed a motion to vacate his order with respect thereto as well as to other granted requests not here material. (A. 3) The grounds urged for the motion relating to request 25 was that it required the government to furnish the defendant a list of witnesses. (S.A. 7-18) Vigorously disputing this interpretation, (S.A. 7, 14, 15, 17-18) petitioner nevertheless took the matter under advisement (S.A. 18)

Thereafter, petitioner filed his memorandum opinion denying the Government's motion to vacate his order. (S.

A. 54-57) After concluding that the proper scope of a bill of particulars is a question left largely to the sound discretion of the trial judge (S.A. 54), petitioner analyzed the request and specifically rejected the contention that a list of witnesses would thereby be furnished:

> "It is by no means clear that the names thus provided will be a list of witnesses to be called by the prosecution. That some may be called is obvious. However, it is equally obvious that not all must necessarily be called and customarily are not. Also equally obvious is the fact that others besides persons present at such times may be called as witnesses as, for example agents who investigated transactions involving the defendant by interviewing the other parties thereto, accounting witnesses who testify to computations made by them, etc. The reason for requiring disclosure of their names, however, is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense. Moreover, if the government has any basis for contending that such disclosure will involve physical risk to the individuals or prejudice the government in its ability to produce its evidence, they have not so indicated. Absent such a showing, the defendant is entitled to have the information." (S.A. 55-56).

Finally, petitioner restricted the language of the request seeking information "on which the government relies" to mean information "as that which the government deems relevant and material rather than all such information in the government's possession." (S.A.57) Petitioner thereupon affirmed his prior order granting request 25.

The government, however, failed to file an answer to the request (A. 25). Defendant filed a motion for the entry of an order directing the government to furnish the par-

ticulars, or in the alternative to dismiss the indictments (S.A. 57-59), but the government again refused to comply, contending it would be giving "a list of a substantial number of the government witnesses." (S.A. 20). Petitioner, initially continued the case indefinitely until such time as the Government answered, (S.A. 21) but thereafter, upon objection by the defendant, the motion was continued for sixty days to give the government time to answer or possibly suffer dismissal (S.A. 23).

At the expiration of the sixty days, the government requested a week to reconsider its position (S.A. 32). Petitioner indicated that if the government was unwilling to give the information requested, he would dismiss the indictment (S.A. 32). Thereafter, the government again refused to comply with petitioner's order. In the colloquy between Court and counsel, the information sought by request 25 was further circumscribed to those statements which "were material to the proceedings" (S.A. 36). The government conceded its position sufficiently to agree to furnish statements in the form of admissions made to government agents. (S.A. 37)[2]. But, in spite of petitioner's specific findings that the same was not a direction to furnish a list of witnesses (S.A. 39, 40, 42) the government persisted in refusing to give the answers to request 25 which related to statements made to non-government agents. (S.A. 37)

Petitioner delayed the entry of his proposed order (S.A. 53) and in the interim, the government filed in the United States Court of Appeals for the Seventh Circuit its Emergency Petition For Stay Order Pending Filing of Petition

[2] To date, this information has not been furnished the defendant (A. 6).

For Mandamus which was granted. Leave first having been obtained, a petition for writ of mandamus was filed. A Rule To Show cause was thereupon issued against petitioner and after taking the matter upon briefs without oral argument, the Court of Appeals denied the petition for writ of mandamus, holding:

> "The Court finds that the order subject to the petition is not an appealable order, and a review of it would offend the policy against piecemeal appeals in criminal cases, *Cobbledick* v. *United States,* 309 U.S. 323; that mandamus may not be used as a means of reviewing the non-appealable order, *Roche* v. *Evaporated Milk Association,* 319 U.S. 21; that federal courts use mandamus for the traditional purpose of confining a district court to a lawful exercisce of its jurisdiction or to compel it to exercise its proper jurisdiction, *Roche* v. *Evaporated Milk Association;* that the district judge's order upon the goveriment to furnish names and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction, *Roche* v. *Evaporated Milk Association;* that the ruling can be reviewed on appeal from a final judgment; and that there is no question here that the district judge refused to exercise his proper jurisdiction.
>
> "IT IS THEREFORE ORDERED that the petition for writ of mandamus be and it is hereby denied." (App. C, p. 6)

Thereafter, upon the Government's Petition for Reconsideration of that order, the Court of Appeals reversed itself and undertook to consider the petition:

> "The court finds that in the circumstances of this particular case the court should consider the merits of the ruling of the district court challenged by the

government, rather than to remit the government to a radical alternative appealable judgment available to the trial judge upon the government's persistent refusal to comply;

"It is therefore ordered that the order of this court of July 12, 1966, be and it is hereby vacated, and the cause is taken by the court upon the petition for the writ, the briefs of both parties and the record." (App. D, p. 7)

Upon reconsideration, and without opinion, it finally ordered that a writ of mandamus issue directing your petitioner to vacate his order directing the government to answer question 25 in defendant's motion for bill of particulars. (App. E, pp. 8-9)

REASONS FOR GRANTING THE WRIT

1. The issuance by the Court of Appeals of the extraordinary writ of mandamus to review the exercise of discretion of a District Court in granting a bill of particulars effects a substantial departure from the present judicial administration of the Federal Rules of Criminal Procedure and constitutes such a grave expansion of the government's rights of review in criminal proceedings as to materially alter the trial of criminal cases in the Federal Courts. The decision of the Court below is in conflict with a decision of the Court of Appeals for the Second Circuit.

The decision of the Court below presents for the first time the proposition that the government may gain review of the exercise of discretion by a District Court in granting a bill of particulars. Yet, were the exercise of that discretion adverse to the defendant by a refusal of the particulars, it is clear that no review from that decision would be available to the accused. *Copp* v. *United States*, 168 F. 2d 190 (1st Cir., 1948); see also *DeBella* v. *United States*, 369 U.S. 121 (1962).

The ability of the government to appeal in a criminal case is confined to the grant contained in 18 U.S.C. 3731 and to the limited application of 18 U.S.C. 1404, but neither section permits of appeal in the instant situation. Moreover, since appellate review in criminal cases is limited to final decisions, 28 U.S.C. 1291, *Parr* v. *United States*, 351 U.S. 513 (1956), the effect of the grant of the extraordinary writ of mandamus to review petitioner's interlocutory order is to avoid the statutory conditions of appellate review and thwart the well established policy

against piecemeal appeals. *Cobbledick* v. *United States* 309 U.S. 323 (1940); *United States Alkali Export Association* v. *United States,* 325 U.S. 196 (1945); *Roche* v. *Evaporated Milk Association,* 319 U.S. 21 (1943); *United States ex rel. Potts* v. *Rabb,* 147 F.2d 225 (3rd Cir. 1945) cert. den. 324 U.S. 870 (1945). In addition, because the court below would have no appellate jurisdiction in the first instance over this unfavorable ruling to the government, the use of the writ of mandamus effected review of an otherwise unreviewable order. *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249, 255 (1957); *Roche* v. *Evaporated Milk Association,* 319 U.S. 21 (1943).

The writ of mandamus cannot be used when "the most that could be claimed is that the District Courts have erred in ruling on matters within their jurisdiction." *Parr* v. *United States,* 351 U.S. 513, 520 (1956); *Schlagenhauf* v. *Holder,* 379 U.S. 104, 112 (1964). The power granted to the Court of Appeals by the All Writs Act (28 U.S.C. 1651(a) is not an appellate power but merely an auxiliary power and should not be availed of to correct mere errors in the exercise of conceded judicial power, although it may possibly be used to prevent usurpation of power, if "the lower court is *clearly* without jurisdiction." *Ward Baking Co.* v. *Holtzoff,* 164 F.2d 34, 36 (2nd Cir., 1947) (emphasis added). See also *Schlagenhauf* v. *Holder,* 321 F.2d 43, 48 (7th Cir., 1963) vacated and remanded on other grounds, 379 U.S. 104 (1964).

Certainly the writ cannot issue as here, to permit a Court of Appeals to exercise the discretion entrusted by law to the district court. *Fisher* v. *Delehant,* 250 F. 2d 265 (8th Cir., 1959); *Goldberg* v. *Hoffman,* 226 F.2d 681 (7th Cir., 1955). Yet, it is abundantly clear, that the granting or denial of a request for a bill of particulars is precisely

just that, the exercise of discretion. *Wong Tai* v. *United State,* 273 U.S. 77, 82 (1927). Moreover, since the petitioner's exercise of that discretion cannot, by any means, be viewed clear abuse thereof, the issuance of the writ in these circumstances does not prevent the trial court from acting beyond its jurisdiction, but would impermissibly substitute the lower Court's discretion for that of the district court. *Platt* v. *Minnesota Mining & Manufacturing Co.,* 376 U.S. 240, 245 (1964).

These propositions were in fact accepted and relied upon by the Court below in its Order of July 12, 1966 denying the Petition for Writ of Mandamus (App. C). In spite of the realization that the only correct means available to the Government for review of petitioner's Order was a final appealable order, the court reversed itself concluding that it would not "remit the government to a *radical alternative appealable judgment* available to the trial judge upon the government's persistent refusal to comply" (App. D, p. 7). (emphasis added). Thus the basis for the issuance of the writ of mandamus became the unwillingness of the Court of Appeals to force the representative of the United States to face the "radical alternative" of a final appealable order: presumably holding him in contempt for failing to comply with petitioner's order.

This is not a sufficient reason to authorize the issuance of the extraordinary writ. Other government officials have subjected themselves to findings of contempt in order to obtain review of a lower court order, *Tuohy* v. *Ragen,* 340 U.S. 462 (1951); *Giancana* v. *Johnson,* 335 F.2d 372 (7th Cir., 1964). Nor should this Court permit a new theory of the applicability of the writ of mandamus to be thus engrafted into the course of the judicial process.

If the decision below is permitted to stand, a Pandora's box will have been opened in the administration of criminal justice. Unless this Court acts, the Government will henceforth, through the use of the writ of mandamus, obtain a backdoor review of interlocutory orders which it finds objectionable. This ability also raises serious due process considerations, since a defendant, unlike the Government must suffer a "radical alternative appealable judgment" (of conviction) in order to obtain review of an unfavorable ruling on his request for bill of particulars.

Finally, the decision below is in direct conflict with the holding of the Second Circuit in *United States* v. *Bondy*, 171 F.2d 642 (1948). There the Government sought a writ of mandamus from the grant of a bill of particulars, claiming that by the terms of the order the Court had acted beyond his jurisdiction and that the order was so sweeping as to impose impossible standards of precision in pleading and in effect to "require the United States to furnish the defendants in advance of the trial the evidence to be used against them." (p. 643). Holding that the lower court had jurisdiction to grant a bill of particulars, the writ was denied:

> "The most that can be urged is that the order was so sweeping as to amount to an abuse of discretion; it did not deal with matters beyond the Court's jurisdiction." (p. 644)

Petitioner acted within his jurisdiction pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure and duly exercised his discretion in granting request 25. The issuance of the writ of mandamus by the court below is a substantial departure from the present judicial administration of the Federal Rules of Criminal Procedure. That action constitutes a grave expansion of the government's

right of review in criminal proceedings which will materially alter the trial of criminal cases in the Federal Courts and which raises important due process considerations. In addition, the decision of the Court below is in conflict with the holding of the Court of Appeals for the Second Circuit.

2. The decision below raises important questions regarding the right of a Court of Appeals to substitute its discretion for that of the trial judge in granting a bill of particulars and as to the scope of discretion permitted under Rule 7(f) Federal Rules of Criminal Procedure.

This Court in its supervisory capacity over the administration of the Federal Courts has been ever watchful over the conduct of the various courts. (Sup.Ct.R. 19). Here is presented for the first time the novel question as to what extent may the exercise of discretion of a District Court *granting* a bill of particulars be substituted by the discretion of a Court of Appeals.

It has become axiomatic that where the District Court has exercised its discretion in *refusing* a bill of particulars, unless there is an abuse of that discretion, the action of the court should not be disturbed, since the application is one addressed to the sound discretion of the Court. *Wong Tai* v. *United States,* 273 U.S. 77, 82 (1927). In ascertaining whether the refusal constitutes an abuse of discretion the lower courts have attempted to determine whether the defendant has thereby been prejudiced, subjected to surprise and deprived of opportunity to prepare for trial, *United States* v. *McGuire,* 347 F.2d 99, 101 (6th Cir. 1965) cert. den. 382 U.S. 826; *United States* v. *Doyle,* 234 F.2d 788, 794-5 (7th Cir. 1956) cert. den. 352 U.S. 893 (1956).

Since this issue of abuse of discretion is founded in due process considerations to the defendant under the Fifth Amendment to the Constitution, it is small wonder that we have found no reported cases holding that a *grant* of the bill of particulars constitutes an abuse of discretion. Thus, the only conceivable basis for the action of the Court below substituting its discretion for that of petitioner is to conclude that petitioner either had *no* discretion whatsoever to grant the request or that the exercise of his admitted discretion was beyond his jurisdiction. The former is clearly not the law *Wong Tai* v. *United States*, 273 U.S. 77, 82 (1927) and the latter should clearly not be. Interestingly enough, the lower Court initially avoided the question whether petitioner's order was erroneous, but concluded "the ruling itself was within the Court's jurisdiction." (App. C, p. 6).

The contested request, number 25, seeks information pertaining to oral statements made by the defendant upon which the "'Government relies" (A. 13) to support the charges of the indictment. Included are requests for the names of the persons, to whom they were made, whether they were government agents, who else was present, where and when they occurred, and whether there is a memorandum thereof.

Since the Government consented to furnishing the answer to this request as it applied to statements made to government agents (S.A. 36), the sole portion of the request in contest is as to oral statements made to non-government agents (S.A. 37).

The Government's persistent refusal is founded upon their contention that it would thereby furnish the defendant "a list of a substantial number of the government witnesses." (S.A. 20). Since the court below wrote no opinion,

petitioner must conclude that this position, reiterated in the government's petition for writ of mandamus, was adopted by the Court of Appeals, though in the order of July 12, 1966 they declined to consider that question (App. C, p. 6).

Petitioner specifically found however, that the names to be provided in answering the request was not a list of witnesses, even though some of the persons named might, but not necessarily, be called as witnesses. (S.A. 55-56). Predicating his order within the scope and purpose of Rule 7(f) F.R.Cr.P., Petitioner concluded:

> "The reason for requiring disclosure of their names, however, is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense." (S.A. 56)

Several decisions have granted motions for the names of persons involved in the alleged crime, and in one case, *United States* v. *Solomon,* 26 F.R.D. 397, 407 (S.D. Ill., 1960), a request for the names of all persons with knowledge of facts relevant to the transactions in the indictment was granted: "In a proper case, a bill of particulars may require the disclosure of the identity of witnesses or persons who have knowledge of the transaction charged." See also, *United States* v. *Guterma,* 179 F. Supp. 417 (S.D. N.Y., 1959) (names of people present at origin of the deception scheme); *United States* v. *Vasquez,* 25 F.R.D. 350 (S.D. N.Y., 1958) (names of persons to whom defendant sold narcotics); *United States* v. *Pignone,* 189 F. Supp. 532 (D.C. Conn., 1960) (names of alleged co-conspirators). The mere fact that certain of the information sought by a motion for bill of particulars may involve the revelation

of evidence is not fatal to the demand where justice appears to require it. *United States* v. *Bentvena,* 193 F.Supp. 485 (D.C.N.Y., 1960).

By no means can the grant of the subject request be considered the giving a list of witnesses; but, even if it were, it is clear that petitioner had discretion to do so and acted within his jurisdiction in granting the request. There is no prohibition in either the Federal Rules of Criminal Procedure or in the statutes[3] precluding the exercise of the broad right of discretion contained in Rule 7(f) F.R.Cr.P.

There is no fixed rule with respect to disclosure of the identity of persons of this sort. The problem, if any, is one which calls for the balancing of the public interest in protecting the flow of information against the individual's right to prepare his defense. Where, as here, the District Court has determined that a proper balance of these two policies, taking into consideration the particular circumstances of the case and the nature of the crime charged, the possible defenses, the possible significance of the persons' testimony and other relevant factors, and especially in light of the court's specific finding that such disclosure involves no physical risk to such persons,[4] then

---

[3] Though 18 U.S.C. 3432 requires giving a list of witnesses in capital cases, there is no prohibition in non-capital cases should the court order it. Indeed, in *United States* v. *Van Duzee,* 140 U.S. 169, 173 (1891) this court impliedly acknowledged the power of the court to do so.

[4] "Moreover, if the Government has any basis for contending that such disclosure will involve physical risk to the individuals or prejudice the Government in its ability to produce its evidence, they have not so indicated. Absent such a showing the defendant is entitled to have the information." (S.A. 56)

the petitioner's ruling cannot be held to be other than an exercise of discretion within the court's jurisdiction. See *Scher* v. *United States,* 305 U.S. 251 (1938) and *Roviaro* v. *United States,* 353 U.S. 53 (1957).

To permit the Court below to substitute its discretion for that of petitioner is an impermissible exercise of the use of the writ of mandamus. *Platt* v. *Minnesota Mining & Manufacturing Co.,* 376 U.S. 240, 245 (1964):

> "Here, however, the Court of Appeals undertook a de novo examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the Court should not have done since the writ cannot be used 'to actually control the decision of the trial court' *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 383, 98 L.Ed. 106, 111, 74 S. Ct. 145 (1953)."

Nor was the exercise of petitioner's discretion the creation of a new unauthorized rule, c.f., *Miner* v. *Atlass,* 364 U.S. 641 (1960), or a failure to folow the proscriptions of the existing rules, *United States* v. *Igoe,* 331 F.2d 766 (7th Cir. 1964) cert. den. 380 U.S. 942 reh. den. 380 U.S. 989 (1964).

Should the Court of Appeals be permitted to substitute its interlocutory discretion for that of the trial court, that court will have assumed to itself a heretofore inviolate right of trial discretion granted to the District Judge. The instant exercise of that discretion, even if "so sweeping as to amount to an abuse of discretion . . . did not deal with matters beyond the Court's jurisdiction" *United States* v. *Bondy,* 171 F.2d 642, 644 (2d Cir. 1948). Since Since petitioner had the jurisdiction to act, and did act in the exercise of his discretion, the Court of Appeals cannot interpolate a new and unprecedented authority unto itself "to actually control the decision of the trial Court."

Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379, 383 (1953). To hold otherwise would restrict and confine District Courts to a narrow interpretation of "discretion" and effectively limit an otherwise broad authority of the District Court.

The decision of the Court below will have a portentous effect on the administration of justice in the District Courts. It will cast a hitherto settled area of criminal procedure into areas not authorized by Congress and not approved by the Supreme Court. In direct conflict with the Second Circuit, it will not only permit the Government the right of piecemeal appeal from interlocutory orders unfavorable to it in criminal cases and thereby force Appellate Courts into the role of granting advisory opinions, but it will severely limit a previously broad power of discretion of trial judges.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

HARVEY M. SILETS,
Counsel for Petitioner

7 South Dearborn Street
Chicago, Illinois